Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-086108

Employee: Cheri Allen

Employers: 1) Luther Manor Retirement & Nursing Center
2) Quality Inn/Hannibal Area Hotel Group

Insurers: 1) Missouri Nursing Home Insurance
2) American Home Assurance c/o AIG

Date of Accident: On or about May 14, 2004

Place and County of Accident: Marion County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 26, 2007. The award and decision of Administrative Law Judge Ronald F. Harris, issued November 26, 2007, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 24th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Cheri Allen

Injury No: 04-086108

Dependents: N/A

Employer: #1: Luther Manor Retirement & Nursing Center
#2: Quality Inn/Hannibal Area Hotel Group

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Additional Party:

Insurer: #1: Missouri Nursing Home Insurance
#2: American Home Assurance c/o AIG

Hearing Date: August 27, 2007

Checked by: RFH/tmh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: On or about May 14, 2004.

5. State location where accident occurred or occupational disease was contracted: Marion County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Injured back as result of repetitive motion activities, including pushing, pulling, bending, lifting, and cleaning.

12. Did accident or occupational disease cause death? No. Date of death? N/A.

13. Part(s) of body injured by accident or occupational disease: Neck/shoulder.

14. Nature and extent of any permanent disability: 17½% BAW.

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? $193.84 paid by Quality Inn/American Home Assurance.

17. Value necessary medical aid not furnished by employer/insurer? See award.

18. Employee's average weekly wages: $270.00.

19. Weekly compensation rate: $180.00/$180.00.

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: By Quality Inn/American Home Assurance

Medicaid Lien	$10,097.59
Palmyra Clinic Bill of May 14, 2004	314.00
Out-of-Pocket Expenses, Pharmacy	80.58
TTD 7-27-04 to 3-15-05 (33 weeks)x $180.00	5,940.00
PPD 17½% BAW (400 x .175 x $180.00)	12,600.00

TOTAL: $29,032.17

22. Future Requirements Awarded: N/A.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Vicki Dempsey

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cheri Allen

Injury No: 04-086108

Dependents: N/A

Employer: #1: Luther Manor Retirement & Nursing Center
#2: Quality Inn/Hannibal Area Hotel Group

Additional Party:

Insurer: #1: Missouri Nursing Home Insurance
#2: American Home Assurance c/o AIG

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations
of Missouri
Jefferson City, Missouri

Checked by: RFH/tmh

FINAL AWARD

On August 27, 2007, Cheri Allen ("Employee") appeared in person and by her attorney, Vicki Dempsey, for a hearing for a final award on her claim. Employer 1, Luther Manor Retirement and Nursing Center, and its insurer, Missouri Nursing Home Insurance Trust ("LM") were represented by Patrick Reidy. Employer 2, Quality Inn/Hannibal Area Hotel Group and its insurer, American Home Assurance ("QI") were represented by Robert Bidstrup. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS

1) The Missouri Division of Workers' Compensation has jurisdiction over this case;
2) Venue is proper in Marion County;
3) The Claim for Compensation was filed within the time prescribed by law;
4) Both Employers and the Employee were operating under the Missouri Workers' Compensation Law at all relevant times;
5) Employee's average weekly wage was $270.00, which would equate to a compensation rate of $180.00 for both TTD and PPD[1];
6) Both Employers were insured at all relevant times; and
7) Employer #2 (QI) paid medical expenses in the amount of $193.84.

ISSUES

1) Whether proper notice was given to Employers;
2) Did Employee sustain an occupational disease arising out of and in the course of her employment;
3) Are Employee's injuries and continuing complaints medically causally connected to her alleged occupational disease at work on or about May 14, 2004;
4) Application of last exposure rule/liability of insurer.
5) Liability for past medical expenses;
6) Liability for temporary total disability benefits, and if so, for what periods of time;
7) Nature and extent of any permanent partial disability.

EXHIBITS

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Dr. Levy Report
B. Deposition of Dr. Levy
C. Quincy Medical Group Records
D. Blessing Hospital Records
E. Palmyra Clinic Records
F. Advance Physical Therapy Records
G. Luther Manor Personnel Records
H. Quincy Medical Group Bills
I. Blessing Hospital Bills
J. Palmyra Clinic Bills
K. Advance Physical Therapy Bills
L. Walgreens Bills
M. Best Buy Home Care Letter
N. Summary
O. Wage Statement
P. Department of Social Services Medicaid Lien
Q. Collection Letter from CBQ Services

Employer/Insurer 1 Exhibits:

1. Termination Notice
2. Accident/Injuries Procedures

Employer/Insurer 2 Exhibit:

1. Earnings Statement

Joint Employers Exhibits:

1. Deposition of Dr. Mishkin
2. Deposition of Theresa Morris
3. Deposition of Chris Reeter
4. Advance Physical Therapy Account Statement
5. Quincy Medical Group Account Statement
6. Certified records from the Missouri Division of Workers' Compensation

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

Employee's attorney requests a fee of 25% of all benefits awarded.

FINDINGS OF FACT

Based on a comprehensive review of all the testimony and evidence, I find as follows:

The evidence showed that Employee worked for Employer #1 (LM) from January 27, 2004, until June 2, 2004, with her last day of actual work taking place on May 22, 2004. Employee began working for Employer #2 (QI) on May 5, 2004 with July 26, 2004, being the last day she actually worked there.

Employee worked in housekeeping and laundry for the 3-11 p.m. shift at LM. Her duties included cleaning the office, crafts room, therapy room, and dining room. She would dust, mop the floors, pick up trash, and once a week assist another employee in moving the wooden tables and chairs in the dining room. She would push her cleaning cart with a five-gallon mop bucket from room to room. Employee pushed a plastic tub on wheels to three locations to pick up bedding, towels, and clothes of the 60 residents of LM. The laundry was then taken to the room with the washers and dryers where she would separate the clothes by color, load the machines, and eventually fold the clean clothes. Also, included in her duties at LM was the cleaning of two bathrooms and stooping over to clean out the whirlpool tub in the therapy room.

At QI, Ms. Allen also performed housekeeping duties. She worked from 8 a.m. to 2 p.m. cleaning 15-30 motel rooms. Her duties included setting up her cart with laundry basket, clean towels and linens, bars of soap, racks of clean glasses, a vacuum cleaner, and cleaning supplies. She would push the cart to the rooms where she would strip the beds, get down on her knees to check under the bed, pick up dirty towels, trash, and glasses. She then would dust, vacuum, make the beds, and clean the tub, sink, and toilet and clean the bathroom floor on her hands and knees with a rag and disinfectant.

The medical records reflect and Employee testified that she first saw her personal physician, Dr. Wells of the Palmyra Clinic, for pain radiating down her left leg on May, 14, 2004 (Employee Exhibit E). Dr. Wells' medical record of that visit states that, "[S]he has not injured her back recently. It also fails to mention a complaint of work or work-related activities as causing the complaint of pain in the left hip and left buttocks. Finally, Dr. Wells' note for the May 14th visit states, "[A]sked to see her back in three months or sooner if her

pain persists." Employee did not return to Dr. Wells until July 21, 2004.

Employee testified that she missed one or two shifts at her employment at LM during this time period due to her back pain. She testified that she mentioned her back pain as being work related to one or two people at LM.

Employee returned to work at LM on or about May 18, 2004, and worked one or two more days before leaving her shift early on May 22, 2004, for an undisclosed reason. She later called in to report that she was taking time off to travel to Kansas City to be with her mother who had a stroke. Employee never returned to work at LM and was terminated for violating the facility's "No call-No show" attendance policy.

Following termination at LM, Employee continued to work in her job with QI, working an increasing number of hours, as reflected by Employee Exhibit O (a Wage Statement for her employment with QI):

Pay Period ending May 16, 2004	25 hours
Pay Period ending May 30, 2004	28 hours
Pay Period ending June 13, 2004	57 hours
Pay Period ending June 27, 2004	78.5 hours
Pay Period ending July 11, 2004	66.5 hours
Pay Period ending July 25, 2004	65.5 hours
Pay Period ending July 26, 2004	27.5 hours

The record reflects that in June and July, Employee was working considerably more hours at QI than she had in almost any pay period while working at LM alone and more than she had while working both jobs during the month of May 2004 (according to the testimony of witness Sharon Moore, the Administrator of LM, the paycheck Employee received from LM dated May 28, 2004 covering May 9 through 22 and the check dated June 11, 2004, covering May 23 through June 5, 2004).

Employee subsequently returned to Dr. Wells on July 21, 2004 (Employee Exhibit E), with continuing complaints of left leg pain. Dr. Wells noted that she had been to see a chiropractor and had manipulation three times. The doctor diagnosed employee as having "degenerative joint disease of the lumbar spine". She was referred for physical therapy and an MRI which showed a bulging disc at L4-5. On July 26, 2004, employee was making a bed at QI when the pain intensified.

Employee went to the Blessing Hospital ER on July 29, 2004 (Employee Exhibit D), and was subsequently seen by Dr. Morris on July 31, 2004 (Employee Exhibit D). She was given a steroid injection on August 3, 2004, with slight relief and eventually had surgery on August 19, 2004, by Dr. Morris who performed a hemilaminectomy and disc excision (Employee Exhibit D).

Employee filed her initial Claim for Compensation in this case on September 1, 2004, alleging injury to her back from repetitive tasks doing housekeeping and laundry, at QI on July 26, 2004. An Amended Claim was filed on January 17, 2006, adding LM as an Employer and amending the date of injury from July 26, 2004, to May 14, 2004.

Although not a very good historian, I find the employee to generally be a credible witness.

RULINGS OF LAW

Based on a comprehensive review of the substantial and competent evidence described above, including the live testimony, the expert medical opinions and depositions, the medical records, my personal observations of

Employee at hearing and the relevant statutory and case law, I find the following:

Issue 1: Notice

Applying the law in effect at the time of this claim, the statutory notice requirement in 287.420 does not apply to occupational disease cases.[2] *Endicott v. Display Technologies, Inc*., 77 S.W.3d 612 (Mo. banc 2002).

Additionally, Employee testified that she informed both LM and QI of her problems.

The notice issue is resolved in favor of the Employee.

Given the nature of this Claim and the evidence submitted, these two issues in this case can be addressed at the same time.

Issue 2: Did Employee sustain an occupational disease arising out of and in the course of her employment?

Issue 3: Are Employee's injuries and continuing complaints medically causally connected to her alleged occupational disease?

Under Section 287.067.1 RSMo occupational disease is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment." Additionally, 287.067.2 provides that, "an occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." An injury is defined as clearly work related **"**if work was a substantial factor in the cause of the resulting medical condition or disability." 287.020.2 RSMo.

The Court in *Kelley v. Banta & Stude Construction Co., Inc*., 1 S.W.3d 43 (Mo. App. 1999), explained the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that, first, the employee must provide substantial and competent evidence that she contracted an occupationally-induced disease, rather than an ordinary disease of life. There are two considerations to that inquiry: (1) whether there was an exposure to the disease greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id*. at 48. Finally, the Court noted, "where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible." *Id.*

Considering the competent and substantial evidence, I find that Employee met her burden of proving the presence of an occupational disease that arose out of and in the course of employment and which was medically causally connected to the employment.

In arriving at this conclusion, I first considered the testimony provided by Employee. I find that Employee credibly described her job duties and the problems with the pain in her back, radiating down her leg, along with numbness into her foot. Employee testified that her work at both LM and QI involved continuous lifting, bending, stooping, pushing and pulling carts, mops, vacuums and baskets. Although Ms. Sharon Moore, LM's Administrator, disagreed with some of Employee's description of her duties, those differences were for the most part not significant.

Dr. Levy testified that Employee's bulging disc and the resulting surgery was a result of the continuous work she had been performing over a period of months that sort of reached its culmination on a particular day. That is consistent with Employee's testimony of an ongoing problem that ultimately reached the point where she just could not take it anymore or as she described the intensified pain she experienced while making a bed on July 26, 2004, as the "last straw".

On the other hand, Dr. Mishkin concluded that the history given by the Employee did not provide enough information to indicate her occupational duties were a substantial cause for the need for the back surgery. While noting the Employee was a poor historian, it does not appear he made any attempt to ask questions aimed at eliciting information in order to arrive at an informed opinion. Rather, the doctor simply appeared to let the Employee tell him "whatever she wanted" to tell him and then ultimately concluded there was not enough information to relate her problems to her occupational duties. It also appears clear Dr. Mishkin was attempting to find a specific "event" or "incident" at work in order to associate Employee's problems to her occupational duties. The very nature of an occupational disease claim with respect to repetitive motion is that it occurs over a period of time, there is no specific "event" or "incident" as there is in the case of an "accident". For the reasons just stated, I simply do not find Dr. Miskin's opinion credible and find Dr. Levy's opinion to be the more credible of the two.

All of these factors lead to the finding that Employee did sustain an occupational disease, due to repetitive job duties, arising out of and in the course of her employment and which was medically causally connected to work.

Accordingly, on the basis of Employee's credible testimony and the credible and persuasive testimony of Dr. Levy, I find that Employee met her burden of proving the presence of an occupational disease that arose out of and in the course of her employment and which was medically causally connected to the work.

Issue 4: Application of Last Exposure Rule/Liability of Employer(s)/Insurer(s).

Section 287.063 RSMO, also known as "the last exposure" provision of the Workers' Compensation Act, addresses employer liability in occupational disease cases:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.

The interpretation and application of this last exposure rule, as it relates to occupational disease due to repetitive motion, has been addressed by our Supreme Court in *Endicott v. Display Technologies, Inc*., 77 S.W.3d 612, 615 (Mo. banc 2002). The court stated the last exposure rule is not a rule of causation. It held that, "as a starting point, the last employer before the date of the claim is liable if that employer exposed the employee to the hazard of the occupational disease." *Id*. A bright line conclusive presumption is to be utilized in establishing liability for occupational diseases and the fairness of the approach is not determinative. *Walker v. Klaric Masonry, Inc*., 937 S.W.2d 219, 220 (Mo. App. 1996).

The testimony and evidence indicate the Employee performed essentially the same type of work for both employers. QI is the last employer to expose the Employee to the hazard of the occupational disease prior to the filing of the claim.

There is, however, one statutory exception to the last exposure rule which allows an employer to shift liability to a prior employer under certain circumstances. Section 287.067.7, known as the 90-day exception to the last exposure rule provides as follows:

"With respect to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease."

In the instant case, Employee was employed by QI just short of 90 days, so QI may attempt to invoke the 90-

day exception and attempt to shift liability to LM. However, the burden is on QI to prove not only that the employment was for a period of less than 90 days but also that the exposure to the repetitive motion at LM was *the substantial contributing factor* to the injury. The "substantial contributing factor" language in 287.067.7 means "the factor which is the more responsible of the two contributing factors." *Mayfield v. Brown Shoe Co*, 941 S.W.2d 31, 36 (Mo. App. 1997).

Employee did testify that, in her opinion, the work at LM was more physical than the work at QI. However, she did not feel the problems with her back and leg were serious enough to seek medical treatment until May 14, 2004, a couple of weeks before her employment with LM terminated, which was also a couple of weeks after she had begun working at QI. Employee did not return for further treatment following the May 14 visit until July 21, nearly two months after she last worked for LM. Additionally, after leaving employment at LM, the record indicates the employee increased her hours at QI, to the extent she was actually working more hours than she had previously when she was employed by both LM and QI. The employee's testimony and the medical evidence lead one to conclude her condition deteriorated during the time she was employed by QI.

While one certainly can argue the prior employment at LM was "*a*" substantial contributing factor, the evidence and testimony does not support a conclusion the employment at LM was "*the*" substantial contributing factor. The legislature is presumed to have a reason for the particular wording of a statute and the specific language must be given meaning. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. By using "*the*" instead of "*a*" in the statute, it appears the legislature intended to place a high burden on the employer attempting to invoke the 90-day exception to the bright line last exposure rule and thereby shift liability to a prior employer.

The last exposure and the 90-day exception statutory provisions are intended to assist in identifying which employer is liable. There is no provision allowing two employers to share liability. Consequently the agreement between LM and QI to share liability in the event both would be deemed liable is invalid in that only one employer is liable for an occupational disease.

Giving meaning to the plain language of the statute, I conclude QI has failed to meet the burden required to shift liability to a prior employer. Consequently, QI is liable for any benefits deemed to be owed to the Employee.

Issue 5: Liability for past medical expenses

Section 287.140.1 RSMo provides in relevant part "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment…as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." The employer has the right to direct medical care. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against the employer. *Blackwell v. Puritan-Bennett Corp*., 901 S.W.2d 81, 85 (Mo. App. 1995). Employee testified that she had informed QI of her problems and no treatment was offered.

Dr. Levy testified that the treatment rendered employee for care of her back, including the surgery, was reasonable and necessary. Additionally, a sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with the treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc*., 769 S.W.2d 105, 112 (Mo. banc 1989).

Employee Exhibit's H through M set out the bills for treatment rendered employee from Quincy Medical Group (Employee's Exhibit H); Blessing Hospital (Employee's Exhibit I); Palmyra Clinic (Employee's Exhibit J); Advance Physical Therapy (Employee's Exhibit K); Walgreen's (Employee's Exhibit L); and Best Buy (Employee's Exhibit M). A summary of those providers and expenses is set out in Employee's Exhibit N.

The medical bills set out in Employee's Exhibit N show a total $27,693.84 of which $10,215.59[3] was paid by Medicaid and for which Medicaid has filed a lien for recovery; $132.86 paid by Employee and an unpaid balance of $7,579.53. Of the unpaid amount, $387.00 is owed to the Palmyra Clinic, $5,994.53 to Quincy Medical Group and

$1,198.00 owed to Advance Physical Therapy.

Employee reluctantly concedes she is not entitled to recover medical expenses which have been adjusted or written off if she has no liability for payment for those amounts. *See Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. banc. 2003).

LM and QI jointly offered the depositions of Ms. Theresa Morris (Joint Employers Exhibit 2) and Mr. Chris Reeter (Joint Employers Exhibit 3) which were admitted into evidence. Ms. Morris testified that she is a Patient Accounts Supervisor for Group One Health Source, a third party billing company for Palmyra Clinic. Ms. Morris testified that any charges for more than what was paid by Medicaid had been adjusted and payment from the employee would not be pursued. However, with respect to a charge of $314.00 with a service date of May 14, 2004, and a charge of $73.00 with a service date of February 4, 2005, since the employee was not eligible for Medicaid on either of those dates those charges are deemed owed by the employee and have not been adjusted or written off.

Mr. Reeter testified that he is the Social Services Manager for the Division of Medical Services, which is the Medicaid program in Missouri. Mr. Reeter testified that the amount of the Medicaid lien for services rendered on the employee's behalf is $10,097.59. He also testified that absent any written agreement between the individual and the provider to the contrary or unless the individual was not Medicaid eligible, a provider accepts payment from Medicaid as payment in full and may not seek further payment from the individual.

Ms. Lori Catalpa offered live testimony at the hearing. Ms. Catalpa testified that she is the office coordinator for Advance Physical Therapy and is familiar with and has personal knowledge of how the records are kept and maintained. Ms. Catalpa identified the charges in Joint Employers Exhibit 4 as being for therapy rendered to the employee. She further testified those charges had been written off because Medicaid would not pay for physical therapy for people over the age of 18. Ms. Catalpa testified that Advance Physical Therapy would not pursue payment from the employee.

Ms. Megan Lighter also offered live testimony at the hearing. Ms. Lighter testified that she is the Director of the Business Office for Quincy Medical Group. She testified that she is responsible for maintaining the billing systems and the billing records. Ms. Lighter identified Joint Employers Exhibit 5 as a complete and accurate statement of the charges and payments, made with respect to employee's treatment. Ms. Lighter testified that payment received from Medicaid is deemed to be payment in full and that they would not and could not pursue additional payment from employee.

The testimony indicates Employee will not be held responsible to either Quincy Medical Group or Advance Physical Therapy for any amount in excess of what has been paid by Medicaid. However, the testimony of Ms. Morris does indicate employee is still deemed to be responsible for payment of charges of $314.00 for services rendered on May 14, 2004, and $73.00 for services rendered February 4, 2005, during which times employee was not Medicaid eligible.

The medical records of the Palmyra Clinic, Employee's Exhibit E, indicate that on May 14, 2004, employee was seen for pain in the left hip and buttocks going all the way down to her toes. Indeed, on the amended claim for compensation employee listed on or about May 14, 2004, as the date of the occupational disease. Employee's Exhibit E also identifies the $73.00 charge as being for an incident in which the employee was complaining of her "ears ringing". The May 14, 2004, charge in the amount of $314.00 is for treatment for employee's occupational disease claim; the $73.00 charge on February 4, 2005, for a complaint of her "ears ringing" is not related to the occupational disease claim.

Employee also seeks reimbursement for her out of pocket co-payments she paid for medications (Employee's Exhibit L). A review of that exhibit reveals charges in the total amount of $8.00 for January 7 and 15, 2004, too far removed from the May 2004 occupational disease to be deemed related, additionally a refill of a January 15, 2004, prescription in the amount of $2.00 on November 16, 2004, and finally charges in the amounts of $17.29 and $24.99 both on February 4, 2005, the date of the complaints of the ears ringing. Employee is not entitled to reimbursement of these charges totaling $52.28 as she has failed to establish they were related to the occupational disease claim. The

balance of her out-of-pocket expenses in the amount of $80.58 does appear to be related to the occupational disease claim.

QI is directed to pay the Medicaid lien in the amount of $10,097.59 and to pay employee $314.00 still deemed owed to the Palmyra Clinic for the May 14, 2004, charges and to reimburse the employee in the amount of $80.58 for her out-of-pocket expenses.

Issue 6: Liability for TTD, amounts and dates.

Employee seeks TTD benefits from July 27, 2004, to March 15, 2005, at which time she was released by Dr. Morris with work restrictions and began looking for employment. The employee has the burden of proving entitlement to temporary total disability to a reasonable probability. *Cooper v. Medical Centers of Independence*, 955 S.W.2d 570 (Mo. App. 1997)(overruled on other grounds by *Hampton v. Big Boys Steel Erection, Inc.*, 121 S.W.3d 220 Mo. banc 2003).

Employer is responsible for the payment of temporary total disability benefits during the continuance of such disability. Section 287.170. Total disability is defined by 287.020.6 as the "inability to return to any employment and not merely…(the) inability to return to the employment in which the employee was engaged at the time of the accident." The test for determining whether one is entitled to temporary total disability is not whether the person is able to do some work, but whether the person is able to compete for work in the open labor market considering the person's current physical condition. *Thorsen v. Sachs Electric Co*., 52 S.W.3d 611 (Mo. App. 2001)(overruled on other grounds by *Hampton*).

An employee's credible testimony regarding her ability to work can constitute competent and substantial evidence. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223-224 (Mo. banc 2003)(citing *Jost v. Big Boys Steel Erection, Inc*., 946 S.W.2d 777, 779 (Mo. App. 1997).

Having considered the testimony and all the evidence, I find the Employee is entitled to TTD benefits at the agreed upon weekly compensation rate of $180.00 from July 27, 2004, until she was released by Dr. Morris on March 15, 2005. This represents a period of 33 weeks at the weekly rate of $180.00 for a total of $5,940.00. QI is directed to pay employee $5,940.00.

Issue 7: Nature and extent of PPD

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo. App. 1983) (overruled on other grounds by *Hampton*).

Dr. Levy noted upon examination that Employee was still quite tender along the area of the surgical incision and while she had full range of motion, there was some slight discomfort. He also noted Employee continued to have pain in her low back that would intermittently radiate down the left lower extremity all the way down to her foot. Additionally, the pain would become worse with prolonged standing or such activities as lifting, bending, or stooping. Dr. Levy's observations were consistent with employee's testimony at the hearing. Dr. Levy found the employee to have suffered a 35% body as a whole permanent partial disability as the result of her back complaints. Upon cross-examination, the doctor lowered this to 33.75% after considering a 1996 settlement for 1.25% body as a whole with respect to the back.

While finding he could not connect employee's complaints with a specific incident or event and therefore concluding it was not work related, Dr. Mishkin did assess a permanent partial disability rating of 10% of the body as a whole. The doctor also acknowledged that the majority of that disability was attributable to the back surgery.

Based on the testimony and the evidence, I find the employee has a permanent partial disability of 17.5% of the

body as a whole with respect to the problems with her back as the result of her occupational disease. QI is directed to pay the Employee the sum of $12,600.00 (400 x 17.5% x $180.00).

CONCLUSION

Employee met her burden of proving that she sustained a compensable occupational disease arising out of and in the course of her employment and which was medically causally connected to the employment. QI is found to be the employer responsible and is directed to pay the following: Medicaid lien in the amount of $10,097.59; pay Employee $314.00 for an outstanding bill owed to Palmyra Clinic and $80.58 as reimbursement for out-of-pocket expenses paid by employee; TTD benefits from July 27, 2004, to March 15, 2005, at the weekly rate of $180.00 for a total of $5,940.00; and PPD in the amount of $12,600.00 (400 x 17.5% x $180.00).

Employee's attorney requests and is granted a lien in the amount of 25% of all payments for necessary legal services.

Date: _____ Made by: _____

RONALD F. HARRIS
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Jeffrey Buker
***D**irector*
Division of Workers' Compensation

[1] LM and QI entered into an agreement in the event both Employers were found to be liable that LM's liability would be 63% and QI's would be 37%.
[2] Section 287.420 was amended effective August 28, 2005, to specifically include a notice requirement with respect to occupational disease claims.
[3] The actual amount of the Medicaid lien is $10,097.59 (Employee's Exhibit P).